**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.**

**JUDGMENT.**

| | | |
|---|---|---|
| Shri Gram Sewa Sahkari Samiti Limited, Rashmi through Balu Ram | vs. | Shrimati Fefi & anr. |

S.B. Civil Second Appeal No.135/1987 against the judgment and decree dated 18.7.1987 passed by the Addl. District Judge, Chittorgarh in Civil Appeal No.38/85.

Date of Judgment: May 10, 2006.

**PRESENT**
**HON'BLE MR. PRAKASH TATIA,J.**

Mr. Arvind Shrimali, for the appellant.
Mr. sanjay Mathur, for the respondents.

**BY THE COURT:**

Heard learned counsel for the parties.

This appeal is against the judgment and decree of the first appellate court dated 18.7.1987 whereby the first appellate court reversed the judgment and decree of the trial court dated 6.8.1981.

Brief facts of the case are that the plaintiffs-Gram Sewa Sahkari Samiti and Prabhu Lal, Treasurer of plaintiff no.1-Samiti filed the suit for mere injunction against the defendant Smt.Fefi. According to the plaintiffs, the plaintiff-Society purchased one plot on 7.1.1960 by

registered sale-deed after paying the consideration of Rs.600/- to the vendor. The plot size is 60' x 90'. The possession of the plot was delivered to the plaintiff-Society. Since then the plaintiff-Society is in possession of the said plot. According to the plaint allegations, the plaintiff-Society came to know on 29.3.1977 that the defendant with intention to encroach upon the plaintiff's part of the plot measuring 13 'x 90', collected some construction materials and started digging foundation for raising constructions, therefore, the plaintiffs filed the suit for injunction and prayed that the defendant be restrained from encroaching upon the plaintiffs' land. The plaintiffs valued the suit for injunction and paid the court fees for relief of injunction only. However, in the relief, it has also been prayed that in case during pendency of the suit if possession of the plot is taken by the defendant then the decree for possession may also be granted in favour of the plaintiffs.

The defendant submitted written statement and admitted that the said plot was purchased by the plaintiff-Society by registered sale-deed dated 27.1.1960 and it was purchased through the Society's President Shanti Lal and Secretary Manohar Lal. Said Shanti Lal and Manohar Lal without permission of Society, constructed building over the plot in dispute, therefore, the plaintiff-Society passed the resolution dated 13.3.1964, and decided not to accept the plot over which said Shanti Lal and Manohar Lal constructed seed-godown. In such situation,

the President and the Secretary of the plaintiff-Society gave letter to the Panchayat Samiti of the Village Rashmi on 5.4.1964 and handed over possession of the seed-godown to the Panchayat Samiti, Rashmi. The Panchayat Samiti, Rashmi took possession of the seed-godown and started one veterinary hospital also in the said plot. It is also submitted that part of the land remained in possession of Shanti Lal and Manohar Lal who sold this part of the land measuring 13' x 90' to the defendant by registered sale-deed dated 26.8.1965. The possession of the said piece of land was delivered to the defendant by said Shanti Lal and Manohar Lal, therefore, the defendant is in possession of the plot since 1965. In view of the above, the defendant prayed that the suit of the plaintiffs for injunction only be dismissed.

It will be worthwhile to mention here that the defendant pleaded that she purchased the plot on 26.8.1965 and she is in possession of the plot since then, still the plaintiffs did not amend the suit to challenge the sale-deed dated 26.8.1965 and sought relief of possession on the basis of title. The plaintiffs also did not value the suit for relief of possession, therefore, the suit continued to be suit for injunction, may it be for relief of mandatory injunction in case the defendant takes possession forcibly or illegally during pendency of the suit.

The trial court held that the suit property was purchased by the plaintiff-Society by registered sale-deed dated 27.1.1960, therefore, the

plaintiff-Society became owner of the said plot. In view of the ownership of the plaintiff-Society, Shanti Lal and Manohar Lal had no authority to sell the part of the land of the plaintiff-Society to the defendant. The trial court decreed the suit of the plaintiff not only for mere injunction but granted decree for possession of the plot in favour of the plaintiffs.

The judgment and decree dated 6.8.1981 was challenged by the defendant by preferring regular first appeal. The first appellate court held that even if suit property was purchased by the plaintiff-Society by registered sale-deed dated 27.1.1960, still the plaintiff-Society is not entitled for relief of possession because of the simple reason that the plaintiff filed the suit for mere injunction and not for possession and the defendant was found in possession of the plot in dispute since 1965, which is 11 years before the filing of the suit by the plaintiffs. The trial court did not reject the defendant's contention that she is in possession of the suit land since 1965, therefore, even if period of limitation for filing the suit for recovery of possession has not expired, still in a suit for injunction relief of possession cannot be granted to the plaintiffs in a case where the defendant was in settled possession since last about 11 years before filing of the suit. The judgment and decree of the trial court was set aside by the first appellate court by impugned judgment dated 18.7.1987. Hence this second appeal.

Following substantial question of law was framed by this Court while admitting the appeal on 3.5.1988:-

> *"Whether the appellant plaintiff is entitled to decree of possession, in the light of prayer made by him in the plaint without amendment of the plaint."*

According to the learned counsel for the appellant, both the courts below concurrently held that the plaintiff-Society is owner of the plot by virtue of sale-deed dated 27.1.1960. Both the courts below further concurrently held that the sale-deed in favour of the defendant dated 26.8.1965 is illegal and cannot confer any title upon the defendant because of the reason that Shanti Lal and Manohar Lal were not owners of the property nor they had any authority to sell the property on behalf of the plaintiff-Society. Therefore, the sale-deed dated 26.8.1965 is null and void and is of no effect against the plaintiffs. In view of the above facts, a relief of possession can be granted in case where the relief of injunction has been prayed for by the plaintiff-Society. It is also submitted that the plaintiffs prayed that in case the defendant takes possession possession during pendency of the suit, the possession be restored to the plaintiff-Society. It is also submitted that the trial court appreciated the facts of the case and rightly decreed the suit of the plaintiffs. It is also submitted that the plaintiff-Society is owner of the property whereas the defendant failed to prove his any right, title or interest in the property. The learned counsel for the

appellant further submitted that the claim of defendant's possession is totally false because of the simple reason that the defendant herself pleaded that only walls are constructed on the plot in dispute. In view of the above, the defendant could not have resided in that plot. Therefore, the defendant's possession over the plot in dispute is of the year 1977 and the plaintiffs filed the suit for injunction in the year 1977 itself, therefore, in a suit for injunction relief of possession of finding proof of title in favour of the plaintiff-Society can be granted by the court, without even amendment of the plaint.

I considered the submissions of the learned counsel for the appellant and perused the record also.

It is clear from the facts mentioned above that the plaintiff-Society purchased the suit land on 27.1.1960. Over this plot, Shanti Lal and Manohar Lal constructed building and, therefore,Shanti Lal and Manohar Lal were in actual physical possession of the land in dispute. When Shanti Lal and Manohar Lal tried to hand over the possession of the property to the plaintiff-Society, the plaintiff-Society itself by specific resolution dated 13.3.1964 refused to accept the possession of the property. There is no evidence available on record to show that the possession of the said property was ever taken by the plaintiff-Society after 13.3.1964. Contrary to it, a letter was written by the the President and the Secretary of the Society Shanti Lal and Manohar Lal to the

Panchayat Samiti of the Village Rashmi on 5.4.1964 and they requested that the said property may be taken over by the Panchayat Samiti. Said property was taken over by the Panchayat Samiti and seed-godown and veterinary hospital are running in the said property. The facts are not clear in the written statement and no fact has been pleaded by the plaintiff-Society about this whole affair. If the plot was of the plaintiff-Society and was purchased through said Shanti Lal and Manohar Lal, how the Panchayat Samiti could have demanded any amount from Shanti Lal and Manohar Lal. Be it as it may be, the fact remains is that the defendant is claiming her possession by virtue of the sale-deed of the year 1965. The defendant was found in possession of the suit property. The plaintiff-Society even in the year 1964, four years after the purchase of the suit property, did not accept the possession of the plot from their own representatives, namely, Shanti Lal and Manohar Lal, the then President and the Secretary, then when and how the plaintiff-Society came in possession of the suit property, remained unexplained by the plaintiffs. Shanti Lal and Manohar Lal in the sale-deed in favour of defendant, admitted handing over possession of the suit property to the defendant and they were in position to hand over the possession of the suit property to the defendant. Therefore, even if they sold the property without any authority of law and unauthorizedly, even then factum of delivery of possession stands proved by the oral evidence

supported by the sale-deed. The possession of the plot was with the defendant since 1965 and it was not disclosed by the plaintiffs in the plait. Not only this, the first appellate court, from the evidence of the plaintiff-Society's own witnesses, held that the plaintiffs admitted that the defendant took possession of the plot, may it be two months before the filing of the suit, which means the possession of the suit property was not taken by the defendant after the institution of the suit. In these circumstances, if the first appellate court held that the trial court committed error of fact as well as error of law in decreeing the suit of the plaintiffs, for possession of the suit property, the first appellate court has not committed any error of fact or error of law in peculiar facts and circumstances of this case because of the reason that the plaintiffs did not disclose the complete facts in the plaint and did not pray for relief of possession knowing it well that the defendant is in possession of the suit property from the period before filing of the suit.

In view of the above peculiar facts and circumstances, the relief of possession could not have been granted by the trial court without amendment of the plaint and without payment of the court fees for the said relief.

Consequently, the appeal of the appellant is dismissed.

( **PRAKASH TATIA ),J.**

mlt.